

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA**

MICCOSUKEE TRIBE OF INDIANS OF
FLORIDA,

Plaintiff,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY and UNITED
STATES OF AMERICA,

Defendants,

and

THE STATE OF FLORIDA and
FLORIDA DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

Defendant-Intervenor.

Case No. 1:22-cv-22459-KMM

STATEMENT OF MATERIAL FACTS

1. The State of Florida submitted a proposal to operate a permitting program for the discharge of dredged and fill material to the EPA under Clean Water Act § 404(g) on August 20, 2020. *See* ECF No. 1, Exhibit 1, *Florida's Request To Assume Administration of a Clean Water Act Section 404 Program*, at 1.

2. EPA's regulations at 40 C.F.R. Parts 232 and 233 establish the requirements for an application to assume the Clean Water Act § 404 permitting program and for EPA's approval of such an application. *See* ECF No. 1, Exhibit 2, *EPA's Approval of Florida's Clean Water Act Section 404 Assumption Request*, at 1.

3. Florida's application did not request authority to operate the permitting program on Indian

lands. ECF No. 1, Exhibit 12, *Application Section (a) Description of the Scope and Structure of the State's Program (Required by 40 C.F.R. § 233.11(a))*, at 2-9.

4. The definition of "State Assumed Waters" in Florida's application was as follows:

"State assumed waters" means waters of the United States that the state assumes permitting authority over pursuant to s. 404 of the Clean Water Act, Pub. L. No. 92-500, as amended, 33 U.S.C. ss. 1251 et seq., and rules promulgated thereunder, for the purposes of permitting the discharge of dredge or fill material. [State 404 Program Applicant's Handbook section 2.0 (b) 47. and Section 373.4146(1), F.S.]

ECF No. 1, Exhibit 12, *Application Section (a) Description of the Scope and Structure of the State's Program (Required by 40 C.F.R. § 233.11(a))*, at 2.

5. Florida's application stated that "State-assumed waters...are all waters of the United States that are not retained waters." ECF No. 1, Exhibit 11, *Application Section (h): Description of the Waters of the United States within a State over which the State Assumes Jurisdiction Under the Approved Program (Required by 40 C.F.R. § 233.11(h))*, at 2.

6. The definition of "Retained Waters" in Florida's application was as follows:

"Retained waters" means those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, including wetlands adjacent thereto. The USACE will retain responsibility for permitting for the discharge of dredged or fill material in those waters identified in the Retained Waters List, as well as all waters subject to the ebb and flow of the tide shoreward to their mean high water mark that are not specifically listed in the Retained Waters List, including wetlands adjacent thereto landward to the administrative boundary. The administrative boundary of adjacent retained waters will be the landward project boundary of each project that proposes discharges of dredged or fill material waterward of a 300-foot guide line established from the ordinary high water mark or mean high tide line of the retained water. [State 404 Program Applicant's Handbook section 2.0 (b) 41.]

ECF No. 1, Exhibit 12, *Application Section (a) Description of the Scope and Structure of the*

State's Program (Required by 40 C.F.R. § 233.11(a), at 2.

7. EPA approved Florida's proposal on December 17, 2020. *See* ECF No. 1, Exhibit 2, *EPA's Approval of Florida's Clean Water Act Section 404 Assumption Request*, at 1.

8. EPA's approval of the State of Florida's application resulted in the assumption of CWA § 404 permitting authority for waters within the State's jurisdiction by the State of Florida unless jurisdiction over a water was specifically retained by the Army Corps of Engineers. *See* ECF No. 1, Exhibit 2, *EPA's Approval of Florida's Clean Water Act Section 404 Assumption Request*, at 1.

9. EPA's approval of the State of Florida's application excluded waters within "Indian Country." *See* ECF No. 1, Exhibit 2, *EPA's Approval of Florida's Clean Water Act Section 404 Assumption Request*, at 1.

10. EPA's approval of the State of Florida's application did not identify what waters are considered to be within "Indian Country." *See* ECF No. 1, Exhibit 2, *EPA's Approval of Florida's Clean Water Act Section 404 Assumption Request*, at 1.

11. EPA's approval of the State of Florida's application did not exclude all waters on Indian lands. *See* ECF No. 1, Exhibit 2, *EPA's Approval of Florida's Clean Water Act Section 404 Assumption Request*, at 1.

12. EPA's approval of the State of Florida's application did not identify what waters are considered to be on Indian lands. *See* ECF No. 1, Exhibit 2, *EPA's Approval of Florida's Clean Water Act Section 404 Assumption Request*, at 1.

13. The State of Florida and the Miccosukee Tribe of Indians of Florida entered a settlement agreement that resolved *Miccosukee Tribe of Indians of Florida v. State of Florida, et al.*, Case No. 79-253-CIV-JWK, which had been filed in the United States District Court for the Southern

District of Florida. ECF No. 1, Exhibit 7, *Settlement Agreement Between the Governor and Cabinet as the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida, the Chairman of the Governing Board of the South Florida Water Management District, the Florida Game and Freshwater Fish Commission, and the Miccosukee Tribe of Indians of Florida* at 3-5.

14. The settlement agreement incorporated a lease agreement entitled, Lease Agreement Between the Governor and Cabinet as the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida, the Chairman of the Governing Board of the South Florida Water Management District, the Florida Game and Freshwater Fish Commission, and the Miccosukee Tribe of Indians of Florida. ECF No. 1, Exhibit 7, *Settlement Agreement Between the Governor and Cabinet as the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida, the Chairman of the Governing Board of the South Florida Water Management District, the Florida Game and Freshwater Fish Commission, and the Miccosukee Tribe of Indians of Florida* at 6-7.

15. The lease agreement recognized and preserved in perpetuity certain rights the Miccosukee Tribe holds on lands covered by the agreement, including the right to construct traditional homes. ECF No. 1, Exhibit 7, *Settlement Agreement Between the Governor and Cabinet as the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida, the Chairman of the Governing Board of the South Florida Water Management District, the Florida Game and Freshwater Fish Commission, and the Miccosukee Tribe of Indians of Florida* at 6-7.

16. The Miccosukee Tribe's right to the use the lands covered by the lease agreement are limited only by the specific limitations contained in the lease agreement. ECF No. 1, Exhibit 7,

Settlement Agreement Between the Governor and Cabinet as the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida, the Chairman of the Governing Board of the South Florida Water Management District, the Florida Game and Freshwater Fish Commission, and the Miccosukee Tribe of Indians of Florida at 3-7.

17. The Florida Indian Land Claims Settlement Act of 1982, 25 U.S.C. §§ 1741-1749, Pub. L. 97-399, Dec. 31, 1982, ratified the terms of the settlement agreement and the lease agreement. 25 U.S.C. §§ 1741-1749, at § 1744(b)(1).

18. Plaintiff, the Miccosukee Tribe, is a federally recognized Indian tribe and a Tribal government, which provides essential governmental services to its approximately 605 enrolled members living on and off the Miccosukee's tribal lands. ECF No. 1, *Declaration of Kevin Donaldson* at ¶8 .

19. Tribal members live and work on Indian lands within the Everglades that include reservation, trust, perpetually leased, reserved, and fee simple Indian lands, portions of which are within Everglades National Park, Big Cypress National Preserve, and Water Conservation Area 3A. ECF No. 1, *Declaration of Kevin Donaldson* at ¶¶ 8 and 12-19.

Respectfully submitted,

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